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No. 349

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IN THE

SUPREME COURT

OF THE

United States

October Term, 195.....

JENNIE B. DOWNEY,
Petitioner,

vs.

HERBERT BECK,
Administrator, Appellee.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF

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IN THE

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OF THE

United States

October Term, 195.....

JENNIE B. DOWNEY, *Petitioner,* vs. HERBERT BECK, *Administrator, Appellee.*	No. ____

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Fred M. Vinson and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Jennie B. Downey, petitions this Honorable Court for a Writ of Certiorari or for the reconsideration of its former order of remand on Writ of Certiorari in the case of *Jennie B. Downey vs. Herbert Beck* (No. 529, October Term, 1951), directed to the United States Court of Appeals for the Ninth Circuit, and in respect thereto sets forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28, section 1254(1) U. S. Codes.

The present opinion on remand by this Court was rendered July 18th, 1952, reaffirming its former decision rendered August 6th, 1951 and from which this Court granted certiorari and vacated the judgment and remanded the case to the Court of Appeals for the Ninth Circuit for further consideration in the light of *Beck v. West Coast Life Insurance Company,* decided by the Supreme Court of California on March 21st, 1952. (343 U. S. 912).

OPINIONS

The first opinion of the Court of Appeals for the Ninth Circuit of the United States is recorded in 191 Fed. (2d) 150. The opinion of the Supreme Court of the United States is reported in 343 U. S. 912. The opinion of the Supreme Court of California in the case of *Beck v. West Coast Life Insurance Company,* is reported in 38 A. C. 706, 241 Pac. 2d 544. The District Court of Appeal of the State of California's opinion in the same case is reported in *Beck v. West Coast Life Ins. Co.,* 228 Pac. (2d) 832.

SUMMARY STATEMENT OF THE FACTS AND PROCEEDINGS INVOLVED IN THIS CASE

On March 31st, 1952, this court granted the Petition of Jennie B. Downey for a Writ of Certiorari, directed to the United States Court of Appeals for the Ninth Circuit and its previous judgment and order reversing the judgment of the District Court of the United States and this court's order read as follows:

> "PER CURIAM: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *Beck v. West Coast Life Ins. Co.*, decided by the Supreme Court of California on March 21, 1952." 343 U. S. 912.

The case was set down for oral argument by the Court of Appeals. At the very outset, the Court of Appeals said it was standing by its former judgment and that if petitioners here expected any relief, they would have to go back to the Supreme Court of the United States. Thereafter, on July 18th, 1952, the court reaffirmed its former judgment, and we respectfully submit misconceived and misapplied the order of remand of this Court.

On August 12th, 1946, Lila Loly Downey took out a life insurance policy in the People's Life Insurance Company of Frankfort, Indiana, in the sum of $5,000.00. There was also a second policy on that same date, (R. 44-53). Both were double indemnity policies,

but a clause in the policy eliminates this added feature if death is from homicide.

David A. Downey, husband, was named beneficiary, if living, otherwise to Jennie B. Downey, mother-in-law, as a contingent beneficiary. The policy was payable at the Home Office in Frankfort, Indiana, upon receipt of due proof of the interest of the claimant and of the death of Lila L. Downey, the insured. The residence of Lila Downey and David A. Downey was in the State of California. She also took out a similar life insurance policy with the West Coast Life Insurance Company of California, made payable to David A. Downey, if living, otherwise to Jettie Knoll, as contingent beneficiary.

On July 18th, 1947, David A. Downey killed his wife in the State of Colorado. He was subsequently convicted of murder and sentenced to life imprisonment in the State Prison in Colorado, and his conviction was affirmed by the highest court of that State.

Probate proceedings were commenced in the State of California for the estate of Lila L. Downey, where she and her husband resided. Herbert Beck was appointed Administrator of the Estate in California and in this case sued the People's Life Insurance Company to recover the proceeds of the insurance policy. The cause was removed to the United States District Court of Southern California. David A. Downey and Jennie B. Downey had been named third party defendants in the litigation which then proceeded to trial. While the

People's Life Insurance Company appeared in the action for the purpose of saying they were willing to pay the face of the policies and deposit $10,000 with the court for the payments of the policies, the only concern was the determination as to whom the money should be paid.

There was a stipulation as to the facts in which no claim was made on behalf of David A. Downey, but the sole claim being on behalf of Jennie B. Downey, the contingent beneficiary. At about the same time, Beck, the Administrator, also filed suit in the State Courts to collect $10,000 on a policy of insurance taken out with the West Coast Life Insurance Company at about the same time.

The California District Court of Appeal, in *Beck v. West Coast Life Insurance Company,* 228 Pac. (2d) 832, held that the contingent beneficiary was entitled to receive the policy as David A. Downey, although living, could not collect the money and was "civilly dead" under California law and the money should go to the contingent beneficiary named in the policy and contract of insurance by the deceased.

The District Court of the United States, in the instant case, awarded the proceeds in the instant policy to Jennie B. Downey the named contingent beneficiary, holding likewise that David A. Downey, although living, could not collect the money and was "civilly dead" under California law, and that the contingent beneficiary should collect under the policy.

The California Court of Appeal held that the contingent beneficiary was entitled to receive the money (*Beck v. West Coast Life Ins. Co.,* 228 Pac. (2d) 832) and the United States Court of Appeals for the Ninth Circuit held that the contingent beneficiary was not entitled to receive and reversed the judgment of the District Court of the United States, 191 Fed. (2d) 150.

The Supreme Court of California thereafter granted a hearing in the case of *Beck v. West Coast Life Ins. Co.,* and in the interim a petition for certiorari was filed in this court, being No. 529, October Term, 1951.

The Supreme Court of California, March 21st, 1952, affirmed its District Court, holding as follows:

> ". . . the intent of the insured as expressed by the language that she used should be given effect so far as it is possible."

The California Suprme Court then awarded the proceeds of the policy to the alternate and contingent beneficiary Jettie Knoll and denied the estate represented by Beck any of the proceeds.

This Court granted certiorari in the case of *Downey v. Beck* and remanded the case with instructions to the United States Court of Appeals to reconsider its previous decision in the light of *Beck v. West Coast Life Insurance Co.,* decided by the Supreme Court of California on March 21, 1952, 343 U. S. 912.

QUESTIONS PRESENTED BY THIS PETITION

(1) Whether the United States Court of Appeals for the Ninth Circuit has properly decided or determined this case in the light of the order of remand on March 31st, 1952 of this Court.

(2) Whether an innocent beneficiary named in an insurance policy may be deprived of her contractual rights to the proceeds of a policy and someone else substituted who was not named by the insured in the insurance policy.

(3) Whether second innocent beneficiary in such a vested property interest in the proceeds of the policy upon the death of the insured, by the taking it away and giving it to an unnamed person, to-wit the Administrator of the Estate of the insured, constitutes the taking without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

REASONS FOR GRANTING THIS WRIT

I.

The United States Court of Appeals has misinterpreted the order of this court remanding the case for further consideration and has misapplied the law of the case on remand.

II.

The case raises an important question of insurance law and application of laws of different states to a contract of insurance, which should be decided by this Honorable Court.

III.

The decision is in direct conflict with the decision of the Supreme Court of California, the State within which the case was tried.

The majority opinion of the Court of Appeals arbitrarily deprives the named beneficiary in the insurance policy of the proceeds of insurance; it says that it is not governed by the laws of the State of California (where the case was tried) or to be interpreted pursuant to the law of the State of California. It does not say what law it interprets but readopts its opinion and decision in 191 Fed. (2d) 150. That decision neither construes nor applies the law of Iowa nor of Indiana. It applied its own law. Hence, while the opinion does not follow the mandate of this Court to reconsider it and, we deem, to redetermine it in the light of the decision of the Supreme Court of California; it applies its

own law, expressed neither in statute nor in decision, nor according to the law of contract.

This Court has recently applied insurance in accordance with the law of contract, where a veteran's widow, living in California, claimed half the proceeds of an insurance policy by reason of the community property law of the State of California. This court held, however, that the contract between the insured and the United States Government was binding and gave the proceeds of the policy to the persons named in the insurance policy, pursuant to the contract of insurance.

The California Supreme Court in interpreting a law, and we believe correctly, in *Beck v. West Coast Life Ins. Co.,* 241 Pac. 2d 544 at page 546 said:

> "As between the estate of the insured and the alternative beneficiary there are three possible solutions. It has been held that the absence of any express provision in the policy permitting the alternative beneficiary to take, when the primary beneficiary is still alive, requires that the proceeds be paid to the estate of the insured. *Beck v. Downey,* 9 Cir., 191 F. 2d 150, 152. The choice might also be made on the basis of mortality tables and the proceeds paid to the person or persons who would be most likely to take had the murder not been committed. The third solution is to allow the alternative beneficiary to recover the proceeds. *Metropolitan Life Ins. Co. v. McDavid,* D. C., 39 F. Supp. 228; *Neff v. Massachusetts Mutual Life*

Ins. Co., Ohio Com. Pl., 96 N. E. 2d 53, 54-55; *United States v. Kwasniewski*, C., 91 F. Supp. 847, 854; *Sharpless v. Grand Lo*, *Ancient Order of United Workmen*, 135 Minn. , 37, 159 N. W. 1086, L. R. A. 1917B, 670; see(Scott on Trusts, §494.1, p. 2407; Costigan, Note, ll. L. Rev. 505, 509; Wade, Acquisition of Pro ty by Wilfully Killing Another—A Statutory S ution, 49 Harv. L. Rev. 715, 742.

We have concluded that th third solution should be adopted. Because the neficiary clause of a life insurance policy in whic the insured has reserved the right to change ben ciaries is donative and testamentary in char ter, *Grimm v. Grimm*, 26 Cal. 2d 173, 175-176 157 P. 2d 841; *Landrum v. Landrum's Admx.*, 6 Ky. 775, 779, 218 S. W. 274; *Continental Life nsurance Co. v. Palmer*, 42 Conn. 60, 65, the inte t of the insured as expressed by the language tha she used should be given effect so far as possibl *Estate of Lefranc*, 38 Cal. 2d ....., 239 P. 2d 61 and cases cited; see also Probate Code, §101. though her expressed intent that her husband receive the proceeds cannot be given effect, the olicy names the one she wished to take if her hu band could not. It stated that the proceeds shou be paid to the alternative beneficiary, if the pri ary beneficiary predeceased the insured. Thus, i the type of disability that would naturally be a ticipated by the insured, the alternative beneficia y was preferred over the estate of the insured. I this case there occurred the only other possibl contingency in which the primary beneficiary ould be under a disability equivalent to actual de th. The insured

has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds. A holding that the estate of the insured is entitled to the proceeds would not only defeat this intent, but would also enable the murderer to deprive the alternative beneficiary of her opportunity to take in preference to the estate by foreclosing the possibility that the murderer might predecease the insured. The rule that prevents his profiting by his own wrong should not be invoked in such a way as to prejudice the rights of the alternative beneficiary. 'In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights.' Fry, L. J., in *Cleaver v. Mutual Reserve Fund Life Ass'n,* 1892, 1 Q. B. 147, 160."

In a concurring opinion of the United States Court of Appeal, District Judge Fee sought to explain the distinction between the *Beck v. West Coast* case in California and *Downey v. Beck* in this Court on the theory that in one case the beneficiary was a friend while in the instant case the beneficiary was the mother. But no law of insurance makes that distinction and one is not to be deprived of the express benefits of a contract by reason of her relationship to the disqualified person. There is neither statute nor law to support this reasoning. It is purely speculative

to assume or believe that the proceeds of the policy would in any way reach the disqualified husband because his mother, after payment of attorney fees, etc., would receive the proceeds of the policy. Furthermore, that same argument was made in this court in one of the answering points in *Downey v. Beck,* No. 529, and the court nevertheless remanded the case to the United States Court of Appeals with this argument before it.

Since the United States Court of Appeals did not apply California law and asserted that the Law of Indiana or the law of Iowa govern, that law is stronger under Federal Law in holding that the beneficiary of an insurance policy has a vested interest.

WHEREFORE, petitioner prays for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit or for a reconsideration of the case in the light of this Court's order on March 21, 1952, Case 529, October Term, 1951, and for a reversal of the latest judgment of the United States Court of Appeal, Ninth Circuit and affirmation of the judgment of the United States District Court.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

Of Counsel:
Ben C. Cohen,
Alfred Lubin,
Harold J. Kendis.

IN THE

SUPREME COURT

OF THE

United States

October Term, 195.....

JENNIE B. DOWNEY,
Petitioner,
vs.
HERBERT BECK,
Administrator, Appellee.
No. _____

BRIEF IN SUPPORT OF PETITION

To the Honorable Chief Justice Fred M. Vinson and the Honorable Associate Justices of the Supreme Court of the United States:

JURISDICTION

Jurisdiction is conferred by Title 28, section 1254(1) U. S. Codes.

The present opinion on remand by this Court was rendered July 18th, 1952, reaffirming its former decision rendered August 6th, 1951 and from which this Court granted certiorari and vacated the judgment and remanded the case to the Court of Appeals for the

Ninth Circuit for further consideration in the light of *Beck v. West Coast Life Insurance Company,* decided by the Supreme Court of California on March 21st, 1952. (343 U. S. 912).

OPINIONS

The first opinion of the Court of Appeals for the Ninth Circuit of the United States is recorded in 191 Fed. (2d) 150. The opinion of the Supreme Court of the United States is reported in 343 U. S. 912. The opinion of the Supreme Court of California in the case of *Beck v. West Coast Life Insurance Company,* is reported in 38 A. C. 706, 241 Pac. 2d 544. The District Court of Appeal of the State of California's opinion in the same case is reported in *Beck v. West Coast Life Ins. Co.,* 228 Pac. (2d) 832.

SUMMARY STATEMENT OF THE FACTS AND PROCEEDINGS INVOLVED IN THIS CASE

On March 31st, 1952, this court granted the Petition of Jennie B. Downey for a Writ of Certiorari, directed to the United States Court of Appeals for the Ninth Circuit and its previous judgment and order reversing the judgment of the District Court of the United States and this court's order read as follows:

> "PER CURIAM: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *Beck v. West*

Coast Life Ins. Co., decided by the Supreme Court of California on March 21, 1952." 343 U. S. 912.

The case was set down for oral argument by the Court of Appeals. At the very outset, the Court of Appeals said it was standing by its former judgment and that if petitioners here expected any relief, they would have to go back to the Supreme Court of the United States. Thereafter, on July 18th, 1952, the court reaffirmed its former judgment, and we respectfully submit misconceived and misapplied the order of remand of this Court.

On August 12th, 1946, Lila Loly Downey took out a life insurance policy in the People's Lige Insurance Company of Frankfort, Indiana, in the sum of $5,000.00. There was also a second policy on that same date, (R. 44-53). Both were double indemnity policies, but a clause in the policy eliminates this added feature if death is from homicide.

David A. Downey, husband, was named beneficiary, if living, otherwise to Jennie B. Downey, mother-in-law, as a contingent beneficiary. The policy was payable at the Home Office in Frankfort, Indiana, upon receipt of due proof of the interest of the claimant and of the death of Lila L. Downey, the insured. The residence of Lila Downey and David A. Downey was in the State of California. She also took out a similar life insurance policy with the West Coast Life Insurance Company of California, made payable to David A. Downey, if living, otherwise to Jettie Knoll, as contingent beneficiary.

On July 18th, 1947, David A. Downey killed his wife in the State of Colorado. He was subsequently convicted of murder and sentenced to life imprisonment in the State Prison in Colorado, and his conviction was affirmed by the highest court of that State.

Probate proceedings were commenced in the State of California for the estate of Lila L. Downey, where she and her husband resided. Herbert Beck was appointed Administrator of the Estate in California and in this case sued the People's Life Insurance Company to recover the proceeds of the insurance policy. The cause was removed to the United States District Court of Southern California. David A. Downey and Jennie B. Downey had been named third party defendants in the litigation which then proceeded to trial. While the People's Life Insurance Company appeared in the action for the purpose of saying they were willing to pay the face of the policies and deposit $10,000 with the court for the payments of the policies, the only concern was the determination as to whom the money should be paid.

There was a stipulation as to the facts in which no claim was made on behalf of David A. Downey, but the sole claim being on behalf of Jennie B. Downey, the contingent beneficiary. At about the same time, Beck, the Administrator, also filed suit in the State Courts to collect $10,000 on a policy of insurance taken out with the West Coast Life Insurance Company at about the same time.

The California District Court of Appeal, in *Beck v. West Coast Life Insurance Company,* 228 Pac. (2d) 832, held that the contingent beneficiary was entitled to receive the policy as David A. Downey, although living, could not collect the money and was "civilly dead" under California law and the money should go to the contingent beneficiary named in the policy and contract of insurance by the deceased.

The District Court of the United States, in the instant case, awarded the proceeds in the instant policy to Jennie B. Downey the named contingent beneficiary, holding likewise that David A. Downey, although living, could not collect the money and was "civilly dead" under California law, and that the contingent beneficiary should collect under the policy.

The California Court of Appeal held that the contingent beneficiary was entitled to receive the money (*Beck v. West Coast Life Ins. Co.,* 228 Pac. (2d) 832) and the United States Court of Appeals for the Ninth Circuit held that the contingent beneficiary was not entitled to receive and reversed the judment of the District Court of the United States, 191 Fed. (2d) 150.

The Supreme Court of California thereafter granted a hearing in the case of *Beck v. West Coast Life Ins. Co., and* in the interim a petition for certiorari was filed in this court, being No. 529, October Term, 1951.

The Supreme Court of California, March 21st, 1952, affirmed its District Court, holding as follows:

> ". . . the intent of the insured as expressed by the language that she used should be given effect so far as it is possible."

The California Supreme Court then awarded the proceeds of the policy to the alternate and contingent beneficiary, Jettie Knoll, and denied the estate represented by Beck any of the proceeds.

This Court granted certiorari in the case of *Downey v. Beck* and remanded the case with instructions to the United States Court of Appeals to reconsider its previous decision in the light of *Beck v. West Coast Life Insurance Co.,* decided by the Supreme Court of California on March 21, 1952, 343 U. S. 912.

ARGUMENT

I.

The District Court of the United States for the Southern District of California Reached the Conclusion Correctly in This Case, Whether It Applied the Law of the State of California Regarding "Civil Deaths" or It Be on the Grounds of Public Policy That the First Beneficiary Upon Murdering the Assured Could Not Receive and Take the Money and That the Second Beneficiary is Therefore Entitled Under the Contract to the Proceeds of the Policy. The Court of Appeals Erred in Revising the Policy and Reversing the District Court.

Under *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, California law applied; but where local law of another state was involved, this could also be applied. (*Williams v. Green Bay and W. R. Co.,* 326 U. S. 549, 553, 90 L. Ed. 311 at 314; *Klaxson v. Stentor Elec. Mfg. Co.,* 313 U. S. 487, 85 L. Ed. 1477.)

Under Federal Law, and this court's decision, the beneficiary of an insurance policy has a vested interest from the moment the policy is issued and there is no power in the person either procuring the insurance or anyone else to transfer to any other person the interest of the person named.

Central National Bank of Washington City v. Hume, 128 U. S. 195, 32 L. Ed. 370;

Boyd v. Royal Union Mutual Life Ins. Co., (Iowa), 245 Fed. Rep. 162.

This case holds in accordance with Iowa Law:

> "It is the general rule that a beneficiary under an ordinary life policy takes a vested interest therein at the moment the policy is executed and delivered, which cannot be impaired or defeated by any act of the assured, or of the assured and the company to which said beneficiary does not assent." (Citing many authorities.)

In *Chase National Bank v. United States,* 278 U. S. 327, 73 L. Ed. 406, this court held that the interest of the beneficiaries in the insurance policies vested in them before the death of the deceased and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. In Indiana, the home of the company, where the policy was payable according to its terms the interest of the beneficiary is such that it only can be defeated or cut off by strict compliance with the terms as is in the contract or policy written. Indiana holds that the beneficiary, upon the issuance, delivery and acceptance of a policy, has a defeasible, vested interest. (*Indiana National Life Insurance Company v. McGinnis,* 101 N. E. 289, 45 Law. Rep. Ann. (New Series) page 192 at pages 198, 199.)

The Court of Appeals for the Ninth Circuit ignored the holding of the California Court in *Beck v. Western Life Insurance Company* and ignored both the statutes

in California and the vested rights of the contingent beneficiary and treated the case as though there was a conflict of laws between California and Colorado. The laws of Indiana and Iowa, Indiana being the home state where the policy was written, and payable, and Iowa the place where the policy was delivered, both of whose laws place a vested interet in the beneficiary of a policy.

California:

Beck v. West Coast Life Ins. Co., 241 Pac. 2d 544;

Indiana:

Indiana National Life Ins. Co. v. McGinnis, 101 N. E. 289, 45 Law Rep. Ann. (new series) 192.

Iowa:

Carpenter v. Knapp, 101 Iowa 712, 724, 70 N. W. 764, 38 L. R. A. 128;

Wilmasser v. Continental Life Ins. Co., 66 Iowa 417, 23 N. W. 903;

Lloyd v. Royal Union Mutual Life Ins. Co., No. Dist. of Iowa, 245 Fed. Rep. 162.

California law does not hold that a beneficiary has a vested interest but holds that an ordinary beneficiary of a life insurance policy has merely "an expectancy of an incomplete and inchoate gift which is revocable at the will of the insured."

Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 98;

Phoenix Mutual Life Insurance Co. v. Birkelund, 29 Cal. (2d) 360.

When Lila L. Downey died the rights to the proceeds of the insurance policy then and there became vested rights in David A. Downey and Jennie B. Downey. It has been held that a beneficiary has a recognized property interest in the policy.

U. S. v. Massachusetts Mutual Life Insurance Co., 127 Fed. (2d) 880;
Cannon v. Nichols, 80 Fed. (2d) 934;
Rosenblum v. Manufacturer's Trust Co., 200 N. E. 587, 270 N. Y. 79, 105 A. L. R. 947.

The policy is said to be the measure of the rights of everybody under it.

Logan v. Prudential Insurance Co., 95 Southern 355, 209 Ala. 110.

In cases involving the rights to the proceeds, the law of contracts and not that of inheritance is controlling.

Turner v. Metropolitan Life Insurance Co., 56 Cal. App. (2d) 862, 133 Pac. (2d) 859;
In re Ward's Estate, 15 Pac. (2d) 901; 127 Cal. App. 347.

Provisions of the policy as to the disposition of the proceeds must be construed as the insured intended.

Zolintokis v. Orphanos, 119 Fed. (2d) 571, certiorari denied, 314 U. S. 630; 86 L. Ed. 506;

Fehr v. Cawthon, 293 Fed. 152. Certiorari denied, 263 U. S. 720, 86 L. Ed. 524;

Shaw v. John Hancock Mutual Life Insurance Co., 182 Atlantic 472; 120 Conn. 633;

In re Valverde's Estate, 265 N. Y. S. 484; 148 Misc. 49, 347, affirmed in *In re Valverde's Administrator,* 273 N. Y. S. 371; 242 App. Div. 653.

The proceeds of a life insurance policy usually belong to the beneficiary named therein to the exclusion to the claims of other persons.

Mutual Casualty Company v. Pleitsch, App. 111 S. W. 956.

II.

The Court of Appeals Erred in Holding That the Administrator of the Estate of the Deceased Had the Right to the Proceeds, and Thus Eliminate One of the Contingent Beneficiaries. This is Contrary to Applicable Law.

In general, no one except the beneficiary named in the policy of life insurance has the right to the proceeds on the death of the insured.

Zolintakis v. Orphanos, 119 Fed. (2d) 571;

Certiorari denied; *Orphanos v. Zolintakis,* 314 U. S. 638, 86 L. Ed. 506;

General American Insurance Co. v. Succh, 31 Fed. Supp. 192.

The proceeds of a life insurance policy in which a third person is named as beneficiary belongs exclusively to such beneficiary as an individual.

Nance v. Hilliard, 101 Fed. (2d) 957;
In re Burnett's Estate, 47 Cal. App. 2d 464; 118 P. 2d 298.

They are not the property of the heirs or next of kin.

Miller v. Potter, 186 S. E. 350,, 210 N. C. 268;
Pearce v. National Life & Accident Ins. Co., 125 So. 776, 778, 12 La. App. 608.

They are not subject to administration,

Nance v. Hilliard, 101 F. 2d 957;
Acacia Mut. Life Ins. Assn. v. Walker, 45 F. Supp. 756.

or the laws of descent governing the distribution of insured's personal property,

Heydenfeldt v. Jacobs, 40 P. 492, 107 Cal. 373,

and do not constitute any part, or any asset, of his estate.

Nance v. Hilliard, 101 F. 2d 957;
Acacia Mutual Life Ass'n. v. Walker, 45 F. Supp. 756;
Columbia Trust Co. v. Glenn, 39 F. Supp. 822;
Aetna Life Ins. Co. v. Hartley, 4 F. Supp. 639;
Heydenfeldt v. Jacobs, 40 P. 492, 107 Cal. 373;

In re Burnett's Estate, 118 P. 2d 298, 47 Cal. App. 2d 464;

Prudential Insurance Co. of America v. Beck, 103 O. 2d 241, 39 Cal. App. 2d 355.

III.

Provisions of the Policy as to the Disposition of the Proceeds Must Be Construed as the Insured Intended

Zolintakis v. Orphanos, 119 F. 2d 571, Certiorari denied, 314 U. S. 630, 86 L. Ed. 506;

Fehr v. Cawthon, 293 Fed. 152, Certiorari denied, 263 U. S. 720, 68 L. Ed. 524;

Shaw v. John Hancock Mutual Life Insurance Co., 182 Atlantic 472; 120 Conn. 633;

In re Valverde's Estate, 265 N. Y. S. 484, 148 Misc. 49, 347, affirmed in *In re Valverde's Administratrix,* 273 N. Y. S. 371, 242 App. Div. 653.

In *Horn v. Traveler's Insurance Co.,* there is considerable question whether the Administrator of the insured's estate is even entitled to sue, or has any standing, where the policy is made payable to named beneficiaries.

Bell v. Goodwin, 126 So. 108, 220 Ala. 537.

IV.

The Court of Appeals in This Case Rewrote the Policy Without the Consent of Any of the Contracting Parties, Including the Insurance Company.

The Policy Provides that if there is to be a Change of Beneficiary, such Change must be made upon Written Application to the Insurance Company by the Insured and Approved by the Company. (See Policy page, 47, 56).

The Court of Appeals ignored this provision in the contract and changed the beneficiary to the heirs of the deceased.

The Court of Appeals ignored Iowa law where the policy was delivered and first premium paid (R. 40, 136) or the place where it was to be performed (Indiana) R. 137. Under California Civil Code, Section 1646, and the doctrine of *Erie v. Tompkins* it would have to follow the law of one or the other—i.e., Iowa or Indiana.

An insurance company policy is payable and its terms are to be governed by the law of the state where the contract policy is delivered and the first premium paid or where this is to be performed (*Prichard v. Norton,* 106 U. S. 124, 130, 27 L. Ed. 104, 106; *Northwestern Mutual Life Ins. Co. v. McCue,* 223 U. S. 234, 246, 247, 56 L. Ed. 419, 423, 424; 38 L. R. A. (new Series) 57; *Order of United Commercial Travelers of America v. Edward C. Wolfe,* 331 U. S. 586, 633), the terms of the policy itself show that the policy was executed at

Frankfort, Indiana (R. 44, R. 53, R. 59) and that, according to its terms the sum is payable at the home office of the company in Frankfort, Indiana. Therefore it would seem that since the suit was brought in California that full faith and credit would have to be given to the laws of Indiana, the place of performance, or of Iowa, the place of delivery, *neither of which was considered by the Court of Appeals,* which said *"We need not inquire into the law of Indiana where the policies were issued, or of Iowa where the policies were delivered."* (R. 139).

Under Indiana law as well as under Iowa law, the beneficiary obtained a vested interest in the policy. Indiana law is set forth in *Indiana National Life Ins. Co. v. McGinnis,* 101 N. E. 289, 45 L. R. A. (new series) 192. The Court of Appeals applied neither state's law, nor did it give full faith or credit to the laws of the state where the policy was delivered and first paid or the law governing the performance of the policy. (R. 139). Under California law the policy is to be construed where it is to be performed. Under the decisions of this court the law of the state where the policy is delivered and first premium paid governs.

The suit was brought in the State of California and only removed to the Federal Court by reason of diversity of citizenship. But the Federal Court was bound to give full faith and credit to the laws of the State of Indiana and the laws of the State of Iowa. Section 1646 California Civil Code so provides. In neither state may a person recover who has murdered the as-

sured; nor may there be recovery under federal law decided by this Honorable Court.

The obligation of the contract made between the assured and the company undoubtedly depends upon the law either of Iowa or of Indiana. Since the policy itself provides the place of performance as being Indiana, and since the policy was executed in the State of Indiana, although under the stipulation it was delivered in the State of Iowa, we think that Iowa and Indiana law must necessarily govern.

Indiana's policy is expressed in *Beene v. Gibraltar Industrial Life Ins. Co.,* 63 N. E. (2d) 299, 116 Ind. Appeals 290. This is an expression of universal public policy, including Iowa and is recognized everywhere. See the following cases:

New York Mutual Ins. Co. v. Armstrong, 117 U. S. 590, 29 L. Ed. 997;

Names v. Dwelling House Ins. Co., 95 Iowa 628;

Meyer v. Johnson, 115 Cal. App. 646, 2 Pac. (2) 456;

West Coast Life Ins. Co. v. Crawford, 58 Cal. App. (2d) 771, 138 Pac. (2d) 384;

Beck v. West Coast Life Ins. Co., 228 Pac. (2d) 832.

The laws in existence at the time of the issuance of the contract, under the authority of which the contract is issued, enter into and become a part of the contract to such an extent that the obligation of the contract

cannot thereafter be impaired, hampered or obstructed in any manner.

> *United States ex rel. Von Hoffman v. City of Quincy,* 4 Wall. 71 U. S. 535, 550, 18 L. Ed. 403.

Nothing is more material to the obligation of a contract than its enforcement. The idea of validity and remedy are therefore inseparable and both are parts of the obligation which is guaranteed by the constitution against impairment.

> *Walker v. Whitehead,* 16 Wallace, 83 U. S. 314, 317, 318, 21 L. Ed. 357.

Equally with the law of the state where the contract was made or the contract is to be performed is the public policy which relates to the performance of that law. Where that public policy bars an offender, it is deemed written into the contract at the time of its execution and it must be deemed as good public policy that the offender is presumed to know that you cannot collect insurance on the life of one whom he killed. Therefore, although named as the beneficiary, it will be deemed and he will be treated as though his name was not mentioned in the policy at all.

Indiana has no case law that we can find governing a second contingent beneficiary. But we think that *Oliphant v. Health & Accident Assn.,* 147 Iowa 656, 660, the state where the policy was delivered, has persuasive reasoning. There the owner of a health and accident policy provided in his policy that in the event of acci-

dental death it should be payable to its beneficiary therein named, "if surviving" otherwise to the executors, administrators or legal representatives of the assured. The beneficiary named was the Castle Memorial U. B. Church. The assured subsequently met his death by being shot by an unknown assailant. An Iowa statute forbade the issuance of this type of policy to any beneficiary other than a class of beneficiaries named in the statute. The church was not one so named. The court said the policy was therefore void as to the church and that this beneficiary "did not survive within the meaning of the certificate" and that the administrator who was the next beneficiary named in the policy was therefore entitled to recover.

In *Beck v. West Coast Life Insurance Co.,* 228 Pac. (2d) 832, a California intermediate court, under another policy involving the same parties as this case, gave the property to the contingent beneficiary. A petition for hearing was granted in the Supreme Court of California, and that court also gave the money to the contingent beneficiary, Jettie Knoll, and not to the Estate.

Beck v. West Coast Life Ins. Co., 241 Pac. 2d 544.

And, see:

Horn v. Cole, 156 S. W. (2d) 787, 203 Ark. 361;

West Coast Life Insurance Co. v. Crawford, 138 Pac. (2d) 334; 58 Cal. App. (2d) 771;

De Votell v. Mutual Life Ins. Co. of N. Y., 245 N. W. 58, 60 So. Dak. 532.

Since the public policy feature of the insurance policy as written into the policy defeats the right of David A. Downey, what was the intent of the insured? The intent of the insured as written into the contract and as agreed to by the company was that Jennie B. Downey recover.

The rational of many decisions is as was stated in *Morris v. State Mutual Life Insurance Company,* 183 Penn. 563, 573, 39 Atlantic 5255 that the innocent beneficiary, not bound by any acts or declarations done or made by him (the insured) or to him after the issuance of the policy, unless such acts were in violation of some condition of the policy.

The innocent beneficiary is suing as a party to the contract in her independent right, which does not depend on, nor is it representative of any right of the insured, or the beneficiary as to whom the provisions are void. Who is to recover is determined by the policy that is Jennie Downey.

Wherefore petitioner prays for reversal of the judgment of the Court of Appeals.

The Court of Appeals was not authorized to rewrite the policy which is what it did.

Because the provision of the policy as to David Downey became void as to him it did not make the policy void as to Jennie Downey.

This principle is closely followed in the case of *United States vs. Kwasnewski,* 91 F. Supp. 847. In

that case it was held that where one who was to take under the terms of an insurance policy intentionally and unlawfully kills the assured, or, as in this case, a prior beneficiary, even though acquitted upon the criminal proceedings in the charge of murder, will still be deemed to have pre-deceased the prior beneficiary or the assured, as the case may be, and the proceeds of the policy of insurance will be paid to the next named class of beneficiary as if he were actually dead at the time of the commission of the killing. This is so, even though the condition precedent for such payment of the proceeds be that of the prior named beneficiary not be living or in being at the time of the assured's death.

This case involves the payment of insurance of a GI who named his mother as principal beneficiary, his stepfather as alternate beneficiary, in the event she was not living at the time of the assured's death.

The decision of the Court of Appeals is in conflict with *United States vs. Kwasnewski,* 91 Fed. Supp. 847, and *Metropolitan vs. McDavid,* 39 Fed. Supp. 228.

V.

The Writing of a New Provision Into the Policy of Writing That the Administrator of the Assured Shall Take th Benefits of the Policy, When No Such Provision Is in the Policy, and Depriving the Second Named Beneficiary of the Benefits of the Policy Is the Taking of Property Without Due Process of Law in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and Is Void.

The contract itself provides that the beneficiary shall be David A. Downey, husband as beneficiary, if living, otherwise to Jennie B. Downey, mother-in-law as contingent beneficiary. (R. 44, 53). The policy provides that if the right to change the beneficiary has been reserved, the insured may from time to time change the beneficiary subject to any existing assignment of this policy. (R. 47, 56). Every change of beneficiary must be made by written notice to the company at its home office, accompanied by this policy for endorsement of the change hereon by the company, and unless so endorsed the change shall not take effect. After such endorsement the change will relate back to and take effect as of the date the insured signed the said written notice of change, whether the insured be living at the time of such endorsement or not, but without prejudice to the company on account of any payment made by it before such endorsement. In the event of the death of any revocably or irrevocably designated beneficiary before the insured, the interest of such beneficiary shall vest in the insured unless other-

wise provided herein, or by endorsement hereon. (R. 47, R. 56). "No change of beneficiary shall take effect until endorsed on this policy by the company at its home office." (R. 52, 61).

In *Modern Woodmen of America v. Little,* an Iowa case, 86 N. W. 216, at 217, it is stated:

> "We think it entirely clear upon reason and authority that where the parties have agreed upon a mode by which a change of beneficiaries may be effected, the change can only be made in that mode unless by subsequent agreement, by offer and waiver, or otherwise a different mode is agreed upon. As by the death the rights of the beneficiary became absolutely vested, no change can be thereafter accomplished. When a mode of changing is made a subject of contract, that contract can only be altered by the consent of both parties during the life of the insured."

We do not think that the United States Court of Appeals had a right to change the beneficiary of the policy to the Administrator of the Estate of Lila Downey. It was the intent of the insured in the event that David B. Downey was unable to take that Jennie B. Downey was to receive the benefits of the policy. Her interest under either California or Indiana law or Iowa law became a vested property interest of which she could not be divested without due process of law guaranteed by the Fifth Amendment under the Federal Constitution and the Fourteenth Amendment to the State; and, since this was an action governed by State

Law, we think the Fourteenth ndment in its due process clause prevailed and t the taking from Jennie B. Downey in the circuances here was the taking of her property without dprocess of law, and was an unauthorized rewriting oe policy. Even in jurisdiction where it is held tha beneficiary in the policy reserving the right to chanthe beneficiary has a vested defeasible interest, it iso held that the interest can be divested only in theanner provided for in the policy.

Pottstown Security Co. Pacific Mutual Life Ins. Co., 14 Pa. dist. , 30 Pap. Co. 401.

Mrs. Downey is the innocenbeneficiary in this case. No public policy bars hefrom receiving the contingent proceeds in this cas to which she was named beneficiary.

The questions presented are hly important in the determination of the applicable surance law, which have been incorrectly applied bye Court of Appeals and the case presents a very imptant question of insurance law relating to the rightof contingent beneficiaries. We can find no decisi of this court which squarely determines the right ofhe innocent contingent beneficiary to take the proceds in case the rights of the first beneficiary lapse beuse of his inability to take by reason of public poli, or the right of a court to deprive such innocent ntingent beneficiary of her rights because of the crin of the first named beneficiary.

The questions are of fundamental importance which should be decided by this Honorable Court.

We also think that the questions involved are important as involving the fundamental rights of contract which cannot be impaired or breached even by a Court of Appeals.

WHEREFORE, we pray that this Honorable Court again grant certiorari or reconsider its order under the October Term, 1951, No. 529, decision and reverse the judgment of the United States Court of Appeals and affirm that of the District Court of the United States.

Respectfully submitted,

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